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MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED; KNIGHT CAPITAL AMERICAS L.P., FORMERLY KNOWN AS KNIGHT EQUITY MARKETS L.P.; UBS SECURITIES LLC; E*TRADE CAPITAL MARKETS LLC; NATIONAL FINANCIAL SERVICES LLC; AND CITADEL DERIVATIVES GROUP LLC,

Petitioners,

v.

GREG MANNING; CLAES ARNRUP; POSILJONEN AB; POSILJONEN AS; SVEABORG HANDEL AS; FLYGEXPO AB; AND LONDRINA HOLDING LTD.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Table of Authorities iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND
SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. The Federalism-Protecting Rules That Govern Interpretation of Jurisdictional Statutes Apply Fully To Section 27 7

II. The Jurisdiction Section 27 Confers on Federal Courts (and Withdraws from State Courts) Is Limited To Claims Created By the Exchange Act 13

A. The Text, Structure, and Enactment History of Section 27 Contradict Petitioners' Proposed Rule 13

B. Congress Did Not Intend, and Section 27 Does Not State, a "Test" For Federal Jurisdiction of State Law Claims 20

C. Other Rules Governing the Interpretation of Jurisdictional Statutes Reinforce the Restrained Construction of Section 27 25

III. Section 27, Properly Construed, Both Promotes Greater Interpretive Uniformity and Respects the Exchange Act's Textually-Expressed Preservation of State Authority 28

Conclusion 34

TABLE OF AUTHORITIES

Cases

Am. Well Works v. *Layne & Bowler Co.*,
241 U.S. 257 (1916).....3, 19

Baldwin v. *Fenimore*, 89 P. 2d 883 (Kan. 1939) 20

Beneficial Nat'l Bank v. *Anderson*,
539 U.S. 1 (2003).....22

BT Sec. Corp. v.
W.R. Huff Asset Mgmt. Co.,
891 So.2d 310 (Ala. 2004).....32

Buethe v. *Britt Airlines, Inc.*,
749 F.2d 1235 (7th Cir. 1984) 28

Caterpillar, Inc. v. *Williams*,
482 U.S. 386 (1987).....22, 31

Consumers Imp. Co. v. *Zosenjo*,
320 U.S. 249 (1943).....13

Dahl v. *Charles Schwab & Co.*,
545 N.W.2d 918 (Minn. 1996) 32

Deckert v. *Independence Shares Corp.*,
311 U.S. 282 (1940).....14

Diamond Multimedia Sys., Inc. v.
Superior Court, 968 P.2d 539 (Cal. 1999).....32

El Paso Natural Gas Co. v. *Neztsosie*,
526 U.S. 473 (1999).....31

The Fair v. *Kohler Die & Specialty Co.*,
228 U.S. 22 (1913).....22

Franchise Tax Bd. v. *Constr.*
Laborers Vacation Trust, 463 U.S. 1 (1983) 23

Gateway 2000, Inc. v. *Cyrix Corp.*,
942 F. Supp. 985 (D. N.J. 1996) 22

Grable & Sons Metal Prods., Inc. v.
Darue Eng'g & Mfg.,
545 U.S. 308 (2005).....2, 24, 26

Griffen v. *Cole*, 131 P.2d 989 (Ariz. 1942).....19

Guice v. *Charles Schwab & Co.*,
674 N.E.2d 282 (N.Y. 1996).....33

Gunn v. *Minton*, 133 S. Ct. 1059 (2013).....33

Hathorn v. *Lovorn*, 457 U.S. 255 (1982).....10, 12

Healy v. *Ratta*, 292 U.S. 263 (1934) 9

Holmes Grp., Inc. v. *Vornado Air*
Circulation Sys., Inc.,
535 U.S. 826 (2002).....8, 9, 22

Hough v. *Hough*, 242 P.2d 162 (Okla. 1952).....20

Kokkonen v. *Guardian Life Ins. Co.*,
511 U.S. 375 (1994).....26

Leroy v. *Great W. United Corp.*,
443 U.S. 173 (1979).....15, 29, 30

Marrese v. *American Academy of Orthopaedic Surgeons*,
470 U.S. 373 (1985).....26

Matsushita Elec. Indus. Co. v. *Epstein*,
516 U.S. 367 (1996).....7, 11, 21, 27, 30

McAuliffe v. *W. States Imp. Co.*,
651 N.E.2d 957 (Ohio 1995).....20

Moore v. *Sims*, 442 U.S. 415 (1979).....32

NASDAQ OMX Grp., Inc. v. *UBS Sec., LLC*,
770 F.3d 1010 (2d Cir. 2014).....24

Nanopierce Techs., Inc. v. *Depository Trust & Clearing Corp.*,
168 P.3d 73 (Nev. 2007).....33

New York v. *United States*, 505 U.S. 144 (1992).....9

Nimick v. *Mingo Iron Works Co.*,
25 W. Va. 184 (1884).....20

Ongstad v. *Piper Jaffray & Co.*,
755 N.W.2d 877 (N.D. 2008).....33

Orman v. *Charles Schwab & Co.*,
688 N.E.2d 620 (Ill. 1997).....32

Ohio ex. rel. Popovici v. *Agler*,
280 U.S. 379 (1930).....10

Pan Am. Petroleum Corp. v. *Superior Court*,
366 U.S. 656 (1961).....*passim*

Raygor v. *Regents of Univ. of Minn.*,
534 U.S. 533 (2002).....8, 10

City of Rexburg v. *Madison Cnty.*,
964 P.2d 838 (Idaho 1988).....20

Rodriguez v. *United States*, 480 U.S. 522 (1987).....29

Romero v. *Int'l Terminal Operating Co.*,
358 U.S. 354 (1959).....*passim*

Royal Ins. Co. v. *Roadarmel*,
11 P.3d 105 (Mont. 2000).....20

Shamrock Oil & Gas Corp. v. *Sheets*,
313 U.S. 100 (1941).....8

Shearson/American Express, Inc. v. *McMahon*,
482 U.S. 220 (1987).....31, 32

Sheets v. *Graco, Inc.*,
292 N.W.2d 63 (N.D. 1980).....20

Smith v. *Cremins*, 308 F.2d 187 (9th Cir. 1962).....20

Solid Waste Agency v. *U.S.*
Army Corps of Eng'rs, 531 U.S. 159 (2001) 9

Tafflin v. *Levitt*,
493 U.S. 455 (1990) ..... *passim*

Tarble's Case, 80 U.S. 397 (1871) 9

Torrealba v. *Kesmetis*, 178 P.3d 716 (Nev. 2008) 20

Tumey v. *Ohio*, 273 U.S. 510 (1927) 32

United States v. *Bass*, 404 U.S. 336 (1971) 9

Wilko v. *Swan*, 346 U.S. 427 (1953) 32

Will v. *Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) 27

Wilson v. *Guaranteed Sec. Co.*,
272 P. 946, 949 (Utah 1928) 20

Wyeth v. *Levine*, 555 U.S. 555 (2009) 29

Yellow Freight Sys., Inc. v.
Donnelly, 494 U.S. 820 (1990) 11, 12

Statutes and Legislative Materials

Securities Litigation Uniform Standards
Act of 1998, Pub. L. 105-353,
112 Stat 3227 § 2(4) 30

15 U.S.C. § 77bb(a) 19

15 U.S.C. § 77v(a) 5, 6. 14, 17

15 U.S.C. § 715i(c) 5

15 U.S.C. § 717u 5, 16

16 U.S.C. § 825p 5

18 U.S.C. § 3231 .....11, 12, 33

28 U.S.C. § 371 (1926) 10

28 U.S.C. § 1257 32

28 U.S.C. § 1295 30

28 U.S.C. § 1331 .....*passim*

28 U.S.C. § 1367 2

42 U.S.C. § 1973c 11

42 U.S.C. § 1973j(f) 11

42 U.S.C. § 2014(hh) 31

42 U.S.C. § 7607(b)(1) 30

S. Rep. No. 792, 73rd Cong. 2d. Sess. (1934) 18

78 Cong. Rec. 8099 (1934) 15

78 Cong. Rec. 9935 (1934) 15

Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934 (comp. by J.S. Ellenberger & E. Mahar 1973) 15, 16

Other Materials

13 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3522 (3d ed. 1998) 9

69A Am. Jur. 2d Securities Regulation—Federal § 999 (2015) 29

25 Words and Phrases (Perm. ed. 2008) 20

Jonathan R. Macey & Geoffrey P. Miller, *Origins of the Blue Sky Laws*, 70 Tex. L. Rev. 347 (1991) 31

Uniform Law Commission, *Securities Act Summary*, available at http://www.uniformlaws.org/ActSummary.aspx?title=Securities%20Act 33

STATEMENT OF INTEREST*

Formed in 1919, the North American Securities Administrators Association, Inc. ("NASAA"), is a nonprofit organization devoted to protecting investors from fraud and abuse in the offer and sale of securities. Its 67 members include the securities regulators in Canada, Mexico, all 50 States, the District of Columbia, the United States Virgin Islands, and Puerto Rico.

NASAA members' responsibilities include registering certain types of securities offerings; licensing the firms and agents who offer and sell securities or provide investment advice; and administering, interpreting, and enforcing their States' laws addressing fraud and misconduct in the securities markets.

The important and salutary role these laws play has been recognized by this Court and Congress, including in provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 that explicitly affirm the jurisdiction of state securities regulators and make clear that "rights and remedies" available under federal law are "in addition to" those which States provide. This dual regulatory system protects investors, and, by deterring and detecting fraud and abusive conduct, promotes the strength and integrity of the Nation's securities markets. NASAA

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* Pursuant to Rule 37.6, counsel certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus* or counsel made a monetary contribution to its preparation or submission. Counsel for all parties have consented to its filing.

and its members have a vital interest in the proper interpretation of rules governing the relationship between federal and state securities regulation and have participated as *amicus curiae* in numerous cases in this Court and others where such questions are at issue.

This case implicates matters of direct concern to NASAA and its members. The same reasons that have impelled Congress to affirm state governments' historic power to enact and enforce their own laws in this field strongly support upholding state *courts'* role in interpreting and applying those laws and adjudicating suits claiming relief under state law when they are violated.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, fundamentally, is about federalism—and about state courts' sovereign power to adjudicate cases that arise under their own laws.

There is no disagreement that, as a result of Congress's enactment of Section 27 of the Exchange Act, federal courts have jurisdiction over suits that seek relief for any violation of that statute or its implementing regulations, irrespective of the amount in controversy or citizenship of the parties, and that such jurisdiction is exclusive. Federal courts also have jurisdiction over state law claims that arise out of the same transaction or occurrence as Exchange Act claims, 28 U.S.C. § 1367; and they have original (concurrent) jurisdiction over certain cases that allege *only* state law causes of action but nonetheless "belong[] in a federal court," based on substantial and disputed Exchange Act issues. *Grable & Sons Metal*

Prods., Inc. v. *Darue Eng'g & Manuf.*, 545 U.S. 308, 315 (2005).

Petitioners here urge this Court to extend federal jurisdiction—and *exclusive* federal jurisdiction—further still, to a broad and ill-defined set of cases whose common characteristic is that they *fail* both the traditional "creation" test, see *American Well Works* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), and the *Grable* test, based on the presence of factual allegations of Exchange Act violations, the potential that a state court might "even consider[]" Exchange Act issues in adjudicating state law liability, Pet. Br. 22, or because the state duty the plaintiff seeks to enforce parallels too closely an Exchange Act rule.

There are myriad, compelling reasons why the Court should refuse petitioners' extraordinary proposal.

I. First, the "deeply felt and traditional reluctance" with which courts must approach every invitation to broadly read federal jurisdiction statutes applies with maximal force here. *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959). The regime petitioners propose defies the rule that jurisdictional statutes must be construed with "due regard for the * * * federal system" and for the rightful place of the States. *Ibid.* Petitioners' startling suggestion that this principle is somehow confined to cases interpreting Section 1331—and does not apply to the statutory interpretation question here—is gravely mistaken. This rule of construction is a specific application of general principles that govern every claim that Congress meant to significantly alter the state-federal balance, and the Court repeatedly has relied on it in cases considering

pleas for exclusive federal jurisdiction and ones concerning the scope of exclusive jurisdiction that Congress indisputably granted. Indeed, what distinguishes this case from those prior decisions, which rejected pleas for lack of evidence of an unmistakable congressional intent, is that those cases concerned authority to adjudicate particular *federal* causes of action; petitioners ask the Court here to hold that Congress withdrew from the courts of the States the power to adjudicate cases seeking relief under *their own* laws.

II. The text, structure, and enactment history of Section 27 do not support petitioners' claim. Petitioners are quite right that Section 27 is jurisdiction-conferring. When Congress provided that federal courts "shall have exclusive jurisdiction of all violations * * *" Congress made clear that federal courts would adjudicate "all" suits enforcing the Exchange Act, without having to satisfy the amount-in-controversy requirement under 28 U.S.C. § 1331.

But petitioners are quite wrong about the scope of the jurisdiction Section 27 confers—and denies state courts. Petitioners submit that a Congress intent on conferring exclusive federal jurisdiction over state law claims and repudiating the limitations established under Section 1331 would be expected to use language *different from* the "arising under" formulation, as Section 27 does. But a legislature so motivated would not possibly pursue that purpose by enacting the language codified in Section 27—which is, petitioners concede, narrower than that in Section 1331; which does not hint at any state-displacing purpose and was "taken practically verbatim" from a provision enacted the previous year that gave *state*

courts a species of exclusive jurisdiction over *federal* claims; and which uses "created by [federal law]" language that not only evokes the historic "creation" test for federal jurisdiction but that in fact had long been given just that interpretation.

Petitioners' proposal, ostensibly derived from the "plain" words of the statute, comes eight decades after Section 27 was enacted and more than a half-century after this Court construed the essentially identical jurisdictional provision of the Natural Gas Act, concluding that the departure from "arising under" language was *not* meant to repudiate the rules for determining jurisdiction developed under the general federal question statute.[1] And their central premise is refuted in the U.S. Code itself: In the jurisdictional provision of the Securities Act, 15 U.S.C. § 77v(a), Congress used as synonyms the two phrases petitioners insist it could only have meant to express a "material[] differen[ce]." Pet. Br. 17.

Whether or not petitioners show that the words of Section 27 *could be understood* (by someone unfamiliar with the statutory context and this Court's governing precedents) as extending to cases that arise under state laws, their brief does not describe, and Section 27 does not state, a "clear" "jurisdictional test," Pet. Br. 2—or any "test." Petitioners assure the Court that their regime would retain *certain* familiar jurisdictional rules developed under Section 1331

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[1] The "jurisdiction of violations * * * and actions * * * to enforce any liability or duty created by" language common to these two statutes also appears in provisions of the Federal Power Act, 16 U.S.C. § 825p; the Connally Hot Oil Act, 15 U.S.C. § 715i(c); and the Securities Act of 1933, 15 U.S.C. § 77v(a).

(such as that federal defenses do not support federal jurisdiction) while jettisoning others (*e.g.*, the rule that factual allegations that would entitle the plaintiff to unsought federal relief do not make his case "federal"). But litigants and courts seeking to determine *which* settled principles do and do not govern under "Section 27" would have nowhere to look. It is therefore incorrect that petitioners' blank-slate "rule" is more administrable than the *Grable* multi-factor test. The *Grable* rule may produce close or uncertain cases, but, unlike petitioners' proposal, it produces an overwhelming number of clear results, identifying many disputes that all agree do not belong in federal court.

Considerations of "sound judicial policy" and regard for the statute's place in the "mosaic of federal jurisdiction laws," *Romero*, 358 U.S. at 379–380, confirm what the text, structure, and history of Section 27 already indicate: Only cases satisfying the "creation" test fall within the exclusive jurisdiction Section 27 creates, with state law claims being heard in federal courts only to the extent they belong there, under Section 1331. Unlike the novel and ill-defined regime petitioners urge the Court to launch, this construction preserves the limited character of federal jurisdiction; it ensures that parties know with considerable certainty which cases will get into federal court; it minimizes friction and complexity inherent in multi-forum litigation; and it sensibly allocates judicial responsibility, such that cases raising important and disputed *state law* questions remain within state courts' jurisdiction, while cases raising more substantial and disputed federal ones may (but need not be) heard in federal court.

III. The policy interests petitioners advance and the "premises" they ascribe to the 1934 Act do not support their extraordinary proposal. There is no question that Section 27 promotes "greater uniformity" in the interpretation of the Exchange Act, see Pet. Br. 24 (quoting *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 383 (1996)), consistently with the 73rd Congress's desire to speed the development of a stable and uniform body of law under a novel federal statute enacted in response to an unprecedented economic crisis. But the Exchange Act did not pursue uniformity at all costs: The provision immediately adjacent to Section 27 affirmatively recognizes the importance of state regulation in this field, rather than a strictly uniform federal rule. Section 27's broad venue rule *increases* the likelihood of diverse federal court interpretations, and, petitioners themselves acknowledge (while casting aspersions on state courts' expertise) that Congress trusted those courts to interpret and apply the Exchange Act when raised as a preemption defense. The claimed costs to interpretive uniformity of upholding state courts' historic authority could not possibly justify the disruptive and textually unsupported regime sought here. But in any event, such costs are, for reasons this Court's decisions explain, truly negligible.

ARGUMENT

I. The Federalism-Protecting Rules That Govern Interpretation of Jurisdictional Statutes Apply Fully To Section 27

Petitioners cannot seriously deny that the jurisdictional regime they ask the Court to impose under Section 27, whereby claims that arise

exclusively under state law would be subject to federal courts' exclusive jurisdiction, represents a sharp departure from the historical allocation of judicial responsibility. And they point to no evidence that the 73rd Congress actually considered the implications for the State-federal balance of the extraordinary, if not literally unprecedented, rule petitioners urge and then made a deliberate choice to oust state courts.

Petitioners instead argue that the absence of any clear congressional directive is of no moment, because this Court's precedents calling for "due regard for the interests of the federal system" and expressing "deeply felt * * * reluctance * * * to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes," *Romero*, 358 U.S. at 379, do not "ha[ve] anything to do with § 27," Pet. Br. 36, and relate only to the broadly-worded general federal question provision at issue in *Romero*. *Ibid.* That is mistaken.

The opinion in *Romero* itself addressed "the interpretation of judiciary legislation" generally, see 358 U.S. at 379 (noting that history of such interpretation "teaches the duty to reject treating *such statutes* as a wooden set of self-sufficient words") (emphasis added), and federalism principles have played a central role in decisions construing a vast array of jurisdictional statutes. See *Holmes Grp., Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002) (appellate jurisdiction of Federal Circuit); *Raygor* v. *Regents of Univ. of Minn.*, 534 U.S. 533 (2002) (supplemental jurisdiction); *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 109 (1941) (removal

statute); *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934) (amount-in-controversy requirement).

These principles reflect important practical realities and considerations of "sound judicial policy," *Romero*, 358 U.S. at 376, relating to the workloads of the state and federal courts, their respective expertise, and the need for efficient dispute resolution. But they fundamentally express respect for the sovereignty and "rightful independence of state governments." *Holmes*, 535 U.S. at 832. See *New York* v. *United States*, 505 U.S. 144, 157 (1992) ("Our task would be the same even if one could prove that federalism secured no advantages to anyone."). How States' "laws shall be enacted; how they shall be carried into execution; and *in what tribunals*," are historic incidents of their sovereignty, *Tarble's Case*, 80 U.S. 397, 407 (1871) (emphasis added); and "a federal court's entertaining a case that is not within its subject matter jurisdiction is no mere technical violation; it is nothing less than an unconstitutional usurpation of state judicial power." 13 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3522 (3d ed. 1998).

The principles articulated in *Romero* and like cases about jurisdictional statutes are in fact a particular application of more general rules requiring that all federal statutes be construed to "avoid * * * significant constitutional and federalism questions," *Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 160–161 (2001), and that the proponent of an interpretation that would disturb the state-federal balance identify a clear statement showing that Congress "in fact faced" the federalism consequences, *United States* v. *Bass*, 404 U.S. 336, 349 (1971), and

intended them. See *Raygor*, 534 U.S. at 543 ("When Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.") (internal quotations omitted).

This Court has repeatedly applied these principles when presented with assertions that classes of suits are subject to the exclusive jurisdiction of federal courts, including in cases where statutory text made explicit that Congress meant for *some* disputes to proceed only in federal court. Thus, in Ohio *ex. rel. Popovici* v. *Agler*, 280 U.S. 379 (1930), the Court addressed a statute providing that federal courts' jurisdiction over "all suits and proceedings against * * * consuls or vice consuls," was "exclusive of the courts of the several States," *id.* At 382–383 (quoting 28 U.S.C. § 371 (1926)), and held it did not divest the courts of Ohio of jurisdiction over a divorce proceeding against the Vice-Consul of Romania, because this "pretty sweeping" language should be read in the light of States' longstanding responsibility for adjudicating divorces. *Id.* at 383. The Court held in *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), that "even a finding of exclusive federal jurisdiction over claims arising under a federal statute usually will not prevent a state court from deciding a question collaterally[,]" *id.* at 268 (internal quotation omitted), concluding that a state court had the power (and responsibility) to decide whether a proposed change in voting procedures was "covered" for purposes of Section 5 of the Voting Rights Act, even though Congress was assumed to have vested federal courts with exclusive jurisdiction to decide Section 5

coverage disputes. *Ibid.* (discussing 42 U.S.C. §§ 1973c and 1973j(f)). And in *Matsushita*, the Court addressed the provision at issue here, holding that a state court's consideration—in the course of assessing the fairness of a class action settlement—of claims that avowedly sought relief under the Exchange Act did not run afoul of Section 27's exclusivity directive. See 516 U.S. at 387.

Federalism principles have played an especially prominent role in cases where litigants have presented pleas for exclusive federal court jurisdiction over certain federal claims. In *Yellow Freight System, Inc.* v. *Donnelly*, 494 U.S. 820 (1990), the Court invoked the "system of dual sovereignty" and the "presumptive[] competen[ce]" of state courts, *id.* at 823, to reject a contention that Title VII claims could not be litigated in those courts, notwithstanding a "persuasive showing," supported with explicit statutory text, "that most legislators, judges, and administrators * * * involved in the enactment, amendment, enforcement, and interpretation" of that statute "expected that such litigation would be processed exclusively in federal courts." *Id.* at 826. And in *Tafflin* v. *Levitt*, 493 U.S. 455 (1990), the Court's consideration of the contention that Congress had withdrawn state courts' power to adjudicate civil RICO cases "beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government." *Id.* at 458.

Tafflin is especially instructive, because the plea for exclusivity the Court rejected was based on a federal statute, 18 U.S.C. § 3231, which reserves exclusively to federal courts jurisdiction of federal

criminal offenses, reflecting the "need for uniformity and consistency of federal criminal law," 493 U.S. at 465, and on the fact that adjudicating federal RICO suits would "require[]" state courts "to construe the federal crimes that constitute predicate acts." *Id.* at 464. The Court held that Section 3231 did not support exclusive jurisdiction, because the RICO claims plaintiffs would litigate in state court, while requiring determination of federal law, were "not [themselves] 'offenses against the laws of the United States,' and [would] not result in the imposition of [federal] criminal sanctions," *ibid.* (quoting Section 3231)—and because the practical effect for decisional uniformity would be "negligible," *id.* at 465. See pp. 33–34, *infra*.

The burden on petitioners here is necessarily far more demanding than in those cases. Unlike in *Yellow Freight* or *Hathorn*, the class of cases at issue here are not ones that have long been or were expected to be litigated in federal forums, let alone exclusively there. (And *Tafflin*, unlike this case, involved the practical certainty, not a remote "possibility," that the "exclusive" federal statute would supply an ingredient in the state court's ultimate determination, see Resp. Br. at 23). But most important, each of those decisions insisted upon "unmistakable," "explicit," and "clear," evidence that Congress meant to withdraw from state courts their power to decide *federal law* causes of action. What petitioners ask here strikes far closer at the core of the States' sovereignty, denying their courts the power to adjudicate disputes that seek relief only under their own laws.

II. The Jurisdiction Section 27 Confers on Federal Courts (and Withdraws from State Courts) Is Limited To Claims Created By the Exchange Act

A. The Text, Structure, and Enactment History of Section 27 Contradict Petitioners' Proposed Rule

Petitioners do not point to anything in the circumstances of Section 27's enactment history that suggests that Congress made a considered judgment to divest state courts of their historic power to hear state law claims. (The immediately adjacent provision of the 1934 Act expressly saves those causes of action from preemption, see pp. 29–30, *infra*). Nor do they point to any support in the legal background that supports their interpretation, and they acknowledge that this Court's most directly relevant precedent, *Pan American*, which specifically addressed the relationship between the statutory language and Section 1331, presents grave difficulties for their thesis. See Pet. Br. 38–39.

Rather, petitioners stake their argument on the text of the statute, first arguing that Section 27 should be understood as "jurisdiction conferring," pointing to Congress's use of "shall have jurisdiction" language, and then asserting that: (1) Congress's use of language "conspicuously different" from the familiar Section 1331 "arising under" formulation, Pet. Br. 35 (quoting *Consumers Imp. Co.* v. *Zosenjo*, 320 U.S. 249, 253 (1943)); (2) its commitment to exclusive federal court adjudication; and (3) the "unambiguous" meaning of the "violations" and "[suits] to enforce * * * duties created by [the Act]"

language together establish that Section 27 enacted petitioners' broad and unusual regime.

Petitioners are quite right that Section 27 is a grant of jurisdiction independent of that conferred by Section 1331. By enacting the "shall have * * * jurisdiction" language in Section 27—and in provisions of other contemporary statutes, see note 1, *supra*—the 73rd Congress plainly *did* grant federal courts jurisdiction over certain suits that would otherwise have been subject to state court adjudication under the federal question statute: *i.e.*, ones raising Exchange Act claims that did not meet the then-governing amount-in-controversy requirement. See *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 289–290 (1940) (quoting 15 U.S.C. § 717v(a) and holding that "the Securities Act confer[red] jurisdiction of the suit * * * irrespective of the amount in controversy," because "[t]his is plainly a suit to enforce a liability or duty created by the Act").

But, as the precedents discussed in Part I instruct, the fact that Congress intended for some exclusive jurisdiction does not say anything about the *scope* of jurisdiction it conferred on the federal courts and meant to deny the States. It is more than plausible that Congress chose to provide a federal forum for "any" and "all" suits raising Exchange Act (or Natural Gas Act, see *Pan American*) claims, by relieving plaintiffs of the need to establish—and courts of the need to determine—that Section 1331's $3,000 amount-in-controversy requirement was satisfied, without further intending to divest state

courts of their power to hear cases seeking only state law relief.[2]

1. The fact that Congress employed the "violations * * * and actions to enforce * * * duties created by" language in Section 27, instead of "arising under," does not in itself establish, as petitioners insist, that Congress chose that formulation for "*the purpose*" of "accomplish[ing]" the diminution of state court jurisdiction they urge. Pet. Br. 35 (emphasis added).

That language was "taken practically verbatim out of the Securities Act [of 1933]," 6 *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934* 6577 (comp. by J.S. Ellenberger & E. Mahar 1973) ("Leg. Hist."), and Congress's decision to provide for exclusive, rather than concurrent, jurisdiction over Exchange Act claims was made at the very last stages of the law's enactment, without any recorded debate, see 78 Cong. Rec. 78 Cong. Rec. 8099, 9939 (1934), foreclosing any suggestion that Congress faced up to the disruption of the state-federal balance petitioners' interpretation would work. See *Tafflin*, 493 U.S. at 461 (refusing to find exclusive jurisdiction over federal claim when there was "no evidence that Congress even considered [that]"). But see Pet. Br. 18 (asserting that "the core

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[2] Although the language and context support that Section 27 was meant to confer jurisdiction, the bulk of the provision's text (and that of siblings in other statutes) address matters of venue and service of process, *i.e.*, *which* federal courts would have jurisdiction. Congress answered *that* question broadly and in ways that were ground-breaking. See *Leroy* v. *Great W. United Corp.*, 443 U.S. 173, 188 (1979).

purpose of § 27 was to ensure that such cases are adjudicated exclusively by federal courts").[3]

Moreover, the method that petitioners say Congress "chose" to bring about this extraordinary jurisdictional regime is, to say the very least, startlingly indirect. Had the 73rd Congress meant to extend jurisdiction to cases beyond the outer bounds of Section 1331, it seems unlikely it would have opted for language that is, by *petitioners'* admission, *less* encompassing than "arising under." See Pet. Br. 17.

This Court's 1961 opinion in *Pan American* said that identical language in 15 U.S.C. § 717u, the jurisdiction provision of the Natural Gas Act, *should not* be interpreted as expressing an intent to deviate from the rules developed under Section 1331 for determining federal jurisdiction. See *Pan Am. Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 665 n.2 (1961). Petitioners strain to minimize that decision's significance, noting, *inter alia*, that the Court's conclusion relied "solely" on the Natural Gas Act's legislative history and that the Exchange Act's legislative history contains no comparable explanation of Section 27. Pet. Br. 39. It would be remarkable, however, for the Court to accord different meaning to identically worded, contemporaneously-enacted provisions, based on differences in the

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[3] As the Exchange Act worked its way through Congress, the few mentions of Section 27 described it as "*merely* provi[ding] for the jurisdiction of the courts for violation of the act," 6 Leg. Hist. at 6577 (emphasis added), or, somewhat more expansively, as vesting federal courts with "jurisdiction of offenses and violations of any provision of the bill, and also of suits brought to enforce any liability or duty created by it." *Id.* at 6640.

measures' *committee reports*—and all the more so to justify different constructions based on the *absence* of certain language from the legislative history of one of the statutes. But petitioners' argument asks still more: They invite the Court to infer from these differing committee reports that the same Congress used essentially identical ("jurisdiction of violations * * * *") language to accomplish *diametrically opposite* purposes, effecting a dramatic break from the jurisdictional status quo in Section 27 of the Exchange Act while codifying developed "arising under" principles in Section 22 of the Natural Gas Act.[4]

In fact, the U.S. Code itself definitively refutes the assumption that Section 27's particular language should be taken as a repudiation of the familiar "arising under" jurisprudence. As respondents highlight, the parallel provision of the Securities Act from which Congress adopted the Section 27 language "practically verbatim," see p. 15, *supra*, plainly uses the phrases "violations * * * [and] suits to enforce duties * * * created by [the Act]" and "cases arising under [the Act]" as interchangeable equivalents. Resp. Br. 36 (discussing and quoting 15 U.S.C. § 77v(a)).

2. Nor does the fact that Congress opted for exclusive jurisdiction in Section 27, see Pet. Br. 37, mean that a uniformity-promoting purpose may be

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[4] As explained below, petitioners' further claim, that *Pan American* endorsed "only" the well-pleaded complaint rule (and in particular, the sub-principle that a federal law *defense* does not establish federal jurisdiction), creates even more serious difficulties for their argument. See pp. 21–23, *infra*.

imputed to the provision's "shall have jurisdiction of violations * * * and suits * * * to enforce" language. That very language appears in other contemporaneously-enacted provisions for which no such uniformity focus can be claimed, including ones conferring concurrent jurisdiction and some, such as 15 U.S.C. § 77v(a), that quite unusually prohibit removal from state court of cases that raise only federal law questions.

3. Petitioners' textual argument therefore reduces to assertions that the words of Section 27 *themselves* express a "plain" and "unambiguous" intent to withdraw from state courts power to hear cases seeking relief exclusively under their own laws. This claimed "plain meaning" entirely eluded this Court (and the litigants) in *Pan American*, and in numerous other decisions where Section 27 has been described as conferring jurisdiction of cases "arising under the Exchange Act." See Resp. Br. 38 (collecting cases); *Romero*, 358 U.S. at 379 (observing that judicial "reluctance" to adopt "a broad reading of [a] jurisdictional statute[] * * * must be even more forcefully felt when the expansion is proposed, for the first time, eighty-three years after the jurisdiction has been conferred"). Congress itself described the provision in vanilla terms that gave no hint of any disruptive intent. The Senate Report's final section-by-section summary described Section 27 as establishing that "*[e]nforcement of the act* is confined * * * to United States courts," S. Rep. No. 792, 73rd Cong. 2d. Sess. 23 (1934) (emphasis added), without any mention of the need to seize jurisdiction of state law suits that might call for consideration of an Exchange Act provision or regulation.

In point of fact, petitioners' regime is not especially plausible even as a matter of literal meaning. Congress's grant of "jurisdiction of violations" of the Exchange Act is not naturally, let alone "plainly," Pet. Br. 27, read as divesting state courts of authority to decide cases where a complaint *mentions* that a federal law or regulation was broken (including referencing determinations by another judicial or regulatory body of past violations), but that does not ask the court to grant relief for those violations. See Resp. Br. 20. Section 27's other references to "violation[s]," in its language addressing venue, confirm that natural understanding. Under Section 27, a New Jersey investor seeking to enjoin an Exchange Act violation could not hail the defendant into *Massachusetts* federal court by seeding his complaint with allegations referencing prior "violation[s]" harming Bay State investors. In this case (and many others petitioners would sweep into federal court), proof of *state law* violations is both necessary and sufficient for recovery.

Likewise, the statute's reference to actions "to enforce a duty or liability created by [federal securities law]" does not call to mind a suit whose object is enforcement of duties imposed under *state law*. In fact, that phrase, while a relative rarity in the U.S. Code and the U.S. Reports, had an accepted legal meaning at the time the 1933 and 1934 Acts were passed, one that tracks the historic "creation" test for federal jurisdiction. See *Am. Well Works*, 241 U.S. at 260. State courts nationwide have long held that a suit is one to "enforce[] a liability created by [a statute]" only where the plaintiff's claim owes its existence to that statute. The Arizona Supreme

Court, for example, has held that "[t]he term 'liability created by statute' [means] * * * a liability that comes into being solely by statute" and had "no existence prior to the enactment creating it." *Griffen* v. *Cole*, 131 P.2d 989, 991 (1942). Other decisions are to the same effect: "the test is whether liability would exist absent the statute in question." *Royal Ins. Co.* v. *Roadarmel*, 11 P.3d 105, 108 (Mont. 2000). See *Smith* v. *Cremins*, 308 F.2d 187, 189–190 (9th Cir. 1962) (same, applying California law).[5]

B. Congress Did Not Intend, and Section 27 Does Not State, a "Test" For Exclusive Federal Jurisdiction of State Law Claims

Petitioners' claims to have unearthed a novel jurisdictional "test" (one they pronounce satisfied in this case) is, on closer examination, an assertion that the words in Section 27 *could be* understood (by someone unfamiliar with this Court's jurisdiction precedents and the statutory context) to encompass a case, for example, where the complaint's factual allegations reference defendants' past Exchange Act violations, even though liability would require proof that standards prescribed by state law were violated.

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[5] Indeed, as a compendium of words and phrases attests, cases adopting this canonical formulation could fill the rest of this brief. See 25 Words and Phrases 71-77 (Perm. ed. 2008). See, *e.g.*, *Nimick* v. *Mingo Iron Works Co.*, 25 W. Va. 184, 194 (1884); *Wilson* v. *Guaranteed Sec. Co.*, 272 P. 946, 949 (Utah 1928); *Baldwin* v. *Fenimore*, 89 P. 2d 883 (Kan. 1939); *Hough* v. *Hough*, 242 P.2d 162, 163 (Okla. 1952); *Sheets* v. *Graco, Inc.*, 292 N.W.2d 63, 70 (N.D. 1980); *City of Rexburg* v. *Madison Cnty.*, 964 P.2d 838, 842 (Idaho 1988); *McAuliffe* v. *W. States Imp. Co.*, 651 N.E.2d 957, 960 (Ohio 1995); *Torrealba* v. *Kesmetis*, 178 P.3d 716, 722 (Nev. 2008).

But that same linguistic possibility was present in *Pan American*. The suit held outside exclusive federal jurisdiction there sought to recover from the defendant moneys alleged (and ultimately held) to have been collected "in violation" of the Natural Gas Act. See 366 U.S. at 662, 666. And this indeterminacy arises when attempting to apply petitioners' "test" to the facts in other cases. While petitioners say that statutory "plain language" disables state courts from "even consider[ing]" whether the Exchange Act was violated, Pet. Br. 22, this Court held in *Matsushita* that consideration was not within Section 27's ambit. See 516 U.S. at 385.[6]

Petitioners' claim of an alternative "rule" is undone, to a significant extent, by their efforts to salvage some consistency between their proposal and *Pan American*. They insist (Br. 38) that this Court's decision should be read as "only" endorsing the well-pleaded complaint rule, which they equate with the principle that preemption and other federal law *defenses* do not confer federal jurisdiction.

But as the *Pan American* opinion itself stresses, there is much more to the well-pleaded complaint rule than the proposition that federal defenses are insufficient.[7] The central thrust of the doctrine is

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[6] See also 516 U.S. at 382 & n.7 (describing complaint alleging that defendants wrongly exposed the corporation "to liability under the *federal securities laws*" as one as "asserting purely state law causes of action" for Section 27 purposes) (emphasis added).

[7] *Pan American* was hardly a classic preemption-defense case: The *plaintiffs* invoked federal law, contending that a prior decision holding (federally) unlawful a rate previously paid,

that federal jurisdiction should be determined by the authority under which the plaintiff chooses to seek relief, not by the facts that his complaint alleges: "A plaintiff asserting facts that may invoke either Federal or state jurisdiction may choose to limit the claim to one based solely upon state law and proceed in state court." *Gateway 2000, Inc.* v. *Cyrix Corp.*, 942 F. Supp. 985, 990 (D. N.J. 1996); accord *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 12 (2003) (federal jurisdiction may not be sustained even where facts alleged in support of state-law relief "would *only* support a federal claim"). *Pan American* was emphatic on this point, explaining that it was "immaterial * * * that the plaintiff *could have* elected to proceed on a federal ground. *If the plaintiff decides not to invoke a federal right, his claim belongs in a state court.*" 366 U.S. at 663 (emphasis added) (citation omitted); accord, *e.g.*, *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely upon.").

By jettisoning this integral component of the well-pleaded complaint rule—that the plaintiff, as "master" of the case, "may avoid federal jurisdiction by exclusive reliance on state law," *Beneficial*, 539 U.S. at 12 (quoting *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 392 (1987))—petitioners' proposed rule would defeat the well-pleaded complaint doctrine's central purpose of ensuring that threshold jurisdictional determinations are certain and easily made. See *Holmes*, 535 U.S. at 832. The husk of the

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entitled them to a contractual recovery. See 366 U.S. at 660–661.

rule petitioners would retain under Section 27 (out of ostensible fidelity to the *Pan American* precedent) would make no sense. Were Congress as distrustful of "non-expert" state court interpretation as petitioners insist (see Br. 26), it would be exceedingly strange to leave preemption cases, where the meaning of Exchange Act is sometimes "the only question truly at issue," to *state* courts, *Caterpillar*, 482 U.S. at 389, while assigning exclusively to federal tribunals cases that raise no more than the possibility of a disputed federal question.

In fact, the very common preemption-defense fact-pattern highlights that petitioners' regime is neither "simple" nor grounded in any "clear" language in Section 27's text. Under longstanding precedent, the well-pleaded complaint rule controls where the plaintiff anticipates a preemption plea: "[A] federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts * * * that a federal defense the defendant may raise is not sufficient to defeat the claim." *Franchise Tax Bd.* v. *Constr. Laborers Vacation Trust*, 463 U.S. 1, 10 (1983) (citations omitted). But on petitioners' account, it would seem "plain" that a complaint's assertion that a defendant did not in fact comply with a concededly preemptive federal enactment (and therefore could not defeat recovery) would be an allegation of "a violation" sufficient to oust a state court of jurisdiction.[8]

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[8] That principle is by no means the only important and familiar jurisdictional rule that petitioners would sweep into limbo. The vitality of the principle that a suit alleging a violation of a state law rule that incorporates or merely parallels a federal

Petitioners nonetheless claim (Br. 34) that their "test" is "simple' and "easily administrable," contrasting it to the "complicated," "multi-factor" *Grable* test. That is plainly not so. Petitioners do not propose to *supplant* the *Grable* test for federal jurisdiction, but rather to *supplement* it. Under their proposal, in cases where an issue under the Exchange Act or its statutory relatives are or might be raised (or might have been), a district court could not remand before having considered all *three* bases for assuming jurisdiction— the canonical "creation" test, the *Grable* balancing test, *and* petitioners' Section 27 "test."

But even in direct comparison, the *Grable* test is much more certain and predictable than is petitioners'. To be sure, there are cases where the expected outcome of the *Grable* balancing is uncertain; but that should not obscure the large number of cases (virtually all cases arising under state law) where the *Grable* rule makes immediately clear that a federal forum is *not* available. Petitioners' untested proposal, in contrast, leaves courts and litigants guessing as to which cases are strong or weak candidates for federal jurisdiction. The text of Section 27 says nothing at all about which black-letter jurisdictional rules still operate and which ones (on petitioners' view) are swept aside, and parties seeking to litigate state law claims in state court would have no idea what facts, circumstances,

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standard—as many state securities laws do—does not raise a federal question, see *NASDAQ OMX Grp., Inc.* v. *UBS Sec., LLC*, 770 F.3d 1010, 1022 n.7 (2d Cir. 2014), would likewise be jeopardized, if, as petitioners suggest, the presence of state law complaint allegations that track a federal rule (or that "nearly" do, Pet. Br. 9) triggered exclusive federal jurisdiction.

or allegations risk triggering exclusive federal jurisdiction. (The only truly unambiguous signal petitioners send is to keep state court complaints as bare-bones as possible.).

C. Other Rules Governing the Interpretation of Jurisdictional Statutes Reinforce the Restrained Construction of Section 27

The *Grable* rule in fact highlights how out of line with the existing "mosaic" of federal jurisdiction rules petitioners' regime would be. *Romero*, 358 U.S. at 379. The *Grable* doctrine, while more cumbersome than the creation test, operates as a safety valve, recognizing that there are particular state law cases where particular federal interests—including Exchange Act interests—support (concurrent) federal jurisdiction. But that doctrine, unlike petitioners' proposed regime, places the burden on the party invoking federal jurisdiction and shows explicit regard for state sovereignty, providing a built-in federalism "veto" even for cases that hinge on resolution of substantial federal questions. *Grable*, 545 U.S. at 313. Petitioners propose to supplement this scalpel approach with a meat-axe rule that places within exclusive federal jurisdiction state law cases with the *weakest* claims of a federal ingredient.

Nor are these the only important ways in which petitioners' proposed rule deviates from "sound judicial policy," *Romero*, 358 U.S. at 379. As noted, the only truly certain consequence of adopting petitioners' proposal is that there would be *less* pleading, a result that would adversely affect securities industry interests, as well as those of investors. Injured investors intent on obtaining state law relief from a state court and on avoiding

protracted jurisdictional litigation would have reason to say as little as possible in their complaints, thereby depriving defendants, state judges, and federal courts deciding removal petitions of important information about what was at stake (and inevitably triggering disputes as to whether diverse "heightened pleading" requirements had been met).

At the same time it would improperly deny those who prefer to litigate in *state* courts the power to make that choice (by foregoing federal relief, see p. 22, *supra*), petitioners' regime would also make it improbably easy for a plaintiff who wanted her case in *federal* court to get there. Petitioners' brief proceeds as if their proposal is relevant only to *defendants* in securities cases; but Section 27, the provision their rule ostensibly implements, concerns original, not removal, jurisdiction. Under their rule, a plaintiff's merely adding Exchange Act allegations that are uncontested or unnecessary to resolving the parties' dispute would entitle her to litigate state law claims in a federal forum. The historic "burden of establishing * * * [federal] jurisdiction," *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994), would be tantamount to pushing on an open door, forcing district courts to fashion entirely new rules for identifying and combatting inappropriate invocations of the newly minted "Section 27" jurisdiction.

Moreover, rules like petitioners' proposal, which broaden the categories of claims subject to exclusive, rather than concurrent, jurisdiction increase the complexity, inefficiency, and potential unfairness of litigation. In *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), for example, the Court was required to decide whether a

state court judgment precluded the plaintiff from pursuing federal antitrust claims that could not have been adjudicated in that first proceeding, ultimately concluding that the federal claims were precluded because they were sufficiently similar to ones actionable under state law. *Id.* at 375–377. Under petitioners' proposal, plaintiffs intent on litigating state claims in a state forum would likely have to maintain separate cases, with all the expense and complexity that such litigation entails. See *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) (considering appropriateness of staying proceedings when Exchange Act and state law suits are proceeding concurrently). Indeed, this Court's decision in *Matsushita* rejected an expansive understanding of Section 27, in part to mitigate these complexities and enable parties in cases that straddle state and federal courts to reach mutually acceptable settlements. 516 U.S. at 385–386.

Whether or not petitioners' regime would open litigation floodgates, it would significantly expand the number of cases and alter the character of cases that come within federal courts' jurisdiction. Not only would petitioners' rule mean that almost any case involving securities, natural gas, or electricity in which one party or the other desires federal jurisdiction would get to federal court, but the presence of a single (state law) claim that passed petitioners' "test" would trigger supplemental jurisdiction over state law claims "pendant" to that one.

And adopting petitioners' proposal would severely limit state regulators' ability to enforce their States' own securities laws. Many such state laws parallel

their federal counterparts, often reflecting conscious efforts at coordination and almost invariably making compliance easier. But a rule that overrode—or even merely unsettled—the principle that such parallels do not make a state claim federal, see, *e.g.*, *Buethe* v. *Britt Airlines, Inc.*, 749 F.2d 1235, 1238–1239 (7th Cir. 1984)—would embolden respondents in state administrative and enforcement actions, who are rarely in a rush to reach a merits adjudication, to seek removal to federal court in almost every case. That would, by dramatically increasing the time and money that such governmental enforcement actions would consume, hamstring States' ability to enforce their own laws.

State courts are experts in interpreting and applying their own laws, and abstract sovereignty principles aside, a regime that required federal courts to decide cases raising close or difficult state law questions—based on the presence in a complaint of a tangential federal issue—would impair the quality of judicial decision-making and hinder States' ability to promote and control the development of their own legal rules.

III. Section 27, Properly Construed, Both Promotes Greater Interpretive Uniformity and Respects the Exchange Act's Textually-Expressed Preservation of State Authority

Petitioners' most sustained argument for their rule is not from statutory text or precedent or norms governing interpretation of jurisdictional statutes, but rather from "purposes" and "premises" that they ascribe to Section 27 and to the Exchange Act generally. Petitioners highlight that the Act was supported by congressional findings of a compelling

need for national action and then discuss the general efficiency benefits of unitary regulation and uniform interpretation—in the service of an argument that Section 27 should be read in light of an overriding congressional purpose to eliminate even the possibility of diverse interpretation by (non-expert) state judges.

The serious problems with such arguments are well known: "Purposes" are not enacted through the Constitution's law-making process, see *Wyeth* v. *Levine*, 555 U.S. 555, 587 (2009) (Thomas, J., concurring in the judgment), and "no legislation pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U.S. 522, 525–526 (1987). But the evidence here shows that the purposes and premises petitioners ascribe to Section 27 were not Congress's actual ones.

To begin, although petitioners mix together claims about regulatory non-uniformity—the prospect that an actor might be accountable to 51 different sovereigns—and ones about *interpretive* non-uniformity, *i.e.*, the possibility that the same federal law will be differently applied in different jurisdictions, it is undeniable that Congress intended and expressly approved dual, rather than unitary, securities regulation. The Exchange Act provision immediately next to Section 27 was enacted "to protect * * * state authority," *Leroy* v. *Great W. United Corp.*, 443 U.S. 173, 182 (1979), and to "leave the States with as much leeway to regulate securities transactions as the Supremacy Clause would allow them," *id.* at 182 n.13. It announces that "the rights and remedies [the Act] provided" are "in addition to" those under state law and explicitly affirms "the

jurisdiction of the securities commission * * * of any State." 15 U.S.C. § 77bb(a). See 69A Am. Jur. 2d Securities Regulation–Federal § 999 (2015) (describing this provision as "mak[ing] it absolutely clear that Congress was not preempting the field"). Congress repeatedly has affirmed its view that "State securities regulation is of continuing importance, together with the Federal regulation of securities, to protect investors and promote strong financial markets." Securities Litigation Uniform Standards Act of 1998, Pub. L. 105-353, 112 Stat 3227 § 2(4).

And while the grant of exclusive jurisdiction in Section 27 surely was meant to promote "greater uniformity," *Matsushita*, 516 U.S. at 385, and jump-start development of a body of precedent under a brand-new federal statute, petitioners' suggestions that the 73rd Congress sought to avoid at all costs the possibility that an Exchange Act issue might be considered by a "non-expert" state court judge lack plausibility.

Congress did not even pursue *federal court* uniformity single-mindedly. Section 27 itself includes expansive rules for venue and service of process, see *Leroy*, 443 U.S. at 188 (describing "the underlying policy of § 27 to confer venue in a wide variety of districts in order to ease the task of enforcement of federal securities law[s]"). That regime stands in contrast to ones enacted under statutes where uniform, expert interpretation is manifestly of paramount importance. See, *e.g.*, 28 U.S.C. § 1295 (granting the Federal Circuit exclusive jurisdiction over final decisions in, among others, patent cases); 42 U.S.C. § 7607(b)(1) (judicial review of "any * * * nationally applicable [EPA] regulation[]" may be

pursued only in the D.C. Circuit). See *Tafflin*, 493 U.S. at 465 (recognizing the decisional "inconsistency" that the "multimembered, multi-tiered federal judicial system * * * creates").

Overheated claims of congressional doubts of state court competence cannot be reconciled with the reality that the same Congress expressly *prevented* federal courts from hearing suits under the Securities Act that were first filed in state court, nor with state courts' unchallenged (Pet. Br. 17) authority to adjudicate Exchange Act preemption questions, which entail resolving "highly technical and complex," *id.* 25, often dispositive, Exchange Act questions. Congress rejected complete preemption, as well as field preemption, under the Act. Cf. *Caterpillar*, 482 U.S. at 393; see also *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473 (1999) (applying 42 U.S.C. § 2014(hh), which provides for federal court resolution of Price-Anderson Act preemption defenses). Indeed, for all the talk of state courts' "non-expert[ise]," Pet. Br. 25–26, in 1934 many of those tribunals had more experience adjudicating securities disputes than did their federal counterparts. See Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 Tex. L. Rev. 347 (1991) (detailing early-twentieth-century state securities regulation).

And had Congress determined that federal court resolution of every Exchange Act issue were vitally necessary for interpretative uniformity—and that uniformity itself was of transcendent importance—that judgment would have precluded the decision in *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987), in which the Court recognized that *arbitral* tribunals are "readily capable" of handling

Exchange Act claims, notwithstanding their "factual and legal complexit[y]." *Id.* at 232. Indeed, the most relevant difference between state court and arbitral determination is that state court decisions erroneously interpreting federal law are within federal courts' power to correct. Compare 28 U.S.C. § 1257 and *Tafflin*, 493 U.S. at 464–465 with *McMahon*, 482 U.S. at 231 (discussing *Wilko* v. *Swan*, 346 U.S. 427, 436–437 (1953)). This Court, rejecting exclusive jurisdiction in *Tafflin*, invoked that very "anomal[y]": Arguments "that state courts are incompetent to adjudicate civil RICO suits," the Court explained, lost all force after *McMahon* had rejected that "RICO claims are too complex to be subject to arbitration." 493 U.S. at 466 (quoting 482 U.S. at 239).

To the extent petitioners' arguments ask the Court to presume that state judges are systematically susceptible to "inflammatory" or erroneous arguments where federal law is at issue, Pet. Br. 26, or otherwise cannot be relied upon to "hold the balance nice, clear, and true," *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927), they not only defy repeated admonitions of this Court, see, *e.g.*, *Moore* v. *Sims*, 442 U.S. 415, 430 (1979), and judgments Congress expressed in the 1934 Act, but they ignore empirical reality. State courts are capable of addressing the issue of federal preemption in complex securities law cases. See, *e.g.*, *BT Sec. Corp.* v. *W.R. Huff Asset Mgmt. Co.*, 891 So.2d 310, 316 (Ala. 2004); *Diamond Multimedia Sys., Inc.* v. *Superior Court*, 968 P.2d 539, 559–560 (Cal. 1999); *Orman* v. *Charles Schwab & Co.*, 688 N.E.2d 620, 626 (Ill. 1997); *Dahl* v. *Charles Schwab & Co.*, 545 N.W.2d 918, 926 (Minn.

1996); *Nanopierce Techs., Inc.* v. *Depository Trust & Clearing Corp.*, 168 P.3d 73, 85 (Nev. 2007); *Guice* v. *Charles Schwab & Co.*, 674 N.E.2d 282, 292 (N.Y. 1996); *Ongstad* v. *Piper Jaffray & Co.*, 755 N.W.2d 877, 878–879 (N.D. 2008). See generally *Gunn* v. *Minton*, 133 S. Ct. 1059, 1067 (2013) ("state courts can be expected to hew closely to * * * pertinent federal precedents").[9]

Almost everything else that needs to be said in answer to petitioners' drumbeat "uniformity" assertions was said by this Court in *Tafflin*, which responded to "predict[ions]" that permitting state courts "to interpret federal criminal statutes" as predicates for federal RICO liability would impair "the orderly and uniform development of federal criminal law." 493 U.S. at 464. While recognizing that the "need for uniformity and consistency" was important and textually expressed, see pp. 11–12,

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[9] If anything, the uniformity concerns that may have animated the grant of exclusive jurisdiction have likely ebbed since 1934. When the Exchange Act was first passed, there was reason for concern that state courts, including in States whose laws had supplied the model for certain of the Act's provisions, might not give the federal enactment independent meaning. But more than eight decades of SEC enforcement and federal jurisprudence, including a robust body of federal preemption case law, surely have dampened concern that state courts would confuse state standards with federal ones, and States themselves have adopted uniform laws, fashioned and modified in light of significant developments under federal statutes. See Uniform Law Commission, *Securities Act Summary*, available at http://www.uniformlaws.org/ActSummary.aspx?title=Securities%20Act (explaining that Uniform Securities Act, promulgated in 1956, has been adopted by 37 jurisdictions, including New Jersey).

supra (discussing 18 U.S.C. § 3231)—the Court concluded "that state court adjudication of civil RICO actions will, in practice, have at most a negligible effect on * * * uniform interpretation," noting, *inter alia*, that federal courts "would not be bound by state court interpretations of the federal offenses constituting RICO's predicate acts," while state courts would "be guided by federal court interpretations" and subject to correction on review. See 493 U.S. at 464–465. Accord *Pan American*, 366 U.S. at 665–66 (highlighting that exclusive jurisdiction is not the only means for securing adequate uniformity).

CONCLUSION

The text of Section 27, read according to the rules governing the interpretation of jurisdictional statutes, establishes that Congress did not sweep away fundamental, settled rules allocating responsibility between federal and state courts. Rather, the provision ensured that every cause of action created by the Exchange Act—be it civil or criminal, brought by a government agency or private party, for an affirmative violation of a rule or a failure to comply with a duty—would be litigated in federal court, regardless of the amount in controversy. But Congress did not divest state courts of their jurisdiction over state law violations. This case, which seeks only to enforce duties created by New Jersey law, belongs in the courts of that State.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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